IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Ralph A. Wilt, Jr.,	§	
	§	
Plaintiff	§	Civil Action No. H-02-0576
	§	Consolidated Lead H-01-3624
vs.	§	
	§	
Andrew S. Fastow, *et al.*	§	
	§	
Defendants.	§	

MEMORANDUM OF POINTS AND AUTHORITIES OF THE VINSON & ELKINS DEFENDANTS IN SUPPORT OF THEIR OBJECTION TO THE CONSOLIDATION ORDER OF FEBRUARY 20, 2002 AND OF THEIR MOTION TO SEVER

Vinson & Elkins L.L.P. ("V&E") and Ronald T. Astin, Joseph Dilg, Michael P. Finch, and Max Hendrick III (together, the "V&E Defendants") respectfully object to the consolidation of the claims asserted against them in this case by Ralph Wilt, which are all state law claims, with federal securities-law claims asserted against other parties that have been consolidated under the name *Newby v. Enron Corp., et al.*, Civil Action No. H-01-3264 (S.D. Tex.). There are no other suits against V&E pending in this Court relating to Enron and, absent the February 20, 2002 Order, the V&E Defendants would not be consolidated into the *Newby* case. Because the Defendants are named in this suit with several other groups of defendants who are involved in the consolidated *Newby* litigation, the V&E Defendants also seek severance of the claim against them to facilitate the Court's consideration of the consolidation issue. As we demonstrate below, a consolidation of Wilt's claims against the V&E

Defendants is inconsistent with the December 12, 2001 Order of Consolidation, would be wrong, would raise thorny issues of attorney-client privilege that would unnecessarily complicate the *Newby* case and ultimately would undermine the purpose of the December 12 Order. This memorandum is also submitted in support of the Motion to Sever.

I. BACKGROUND

Wilt filed his action against V&E, four V&E lawyers, 54 other named defendants, and 500 "Doe" defendants on February 14, 2002.[1] The Complaint, which was assigned docket number H-02-576, asserts claims for alleged violations of Texas Business & Commerce Code § 27.01, common-law fraud, and civil conspiracy. It contains no federal-law claims. Wilt does not seek to represent a class but rather asserts only individual claims based on his alleged loss of approximately $11,000 on his investment in Enron. Wilt is represented by Judicial Watch, Inc., a self-described "public interest organization" whose strategy is to "[u]tiliz[e] the court system in a creative manner . . . to expose corruption at all levels of government."[2]

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[1] Wilt's counsel has written counsel for the V&E Defendants with respect to service, and the V&E Defendants intend to execute a waiver of service pursuant to Fed. R. Civ. P. 4(d)(3).

[2] See the organization's website (www.judicialwatch.org/cases.shtml). Others have been less generous in their descriptions. Judicial Watch is best known as "the conservative gadfly group that papered the landscape with lawsuits and discovery motions against then President Bill Clinton." *Roll Call*, Apr. 12, 2001, at p.4.

The "creative" spin of the Wilt complaint is to blame Wilt's alleged $11,000 loss on a "gargantuan fraud perpetrated by directors, officers, accountants, and attorneys of Enron . . . with the assistance of corrupt public officials." Compl. ¶ 1. The Complaint alleges that public officials, including CFTC chairwoman Wendy Gramm, entered into a conspiracy with Enron and its accountants and lawyers. *Id.* ¶¶ 23, 95. Pursuant to this supposed conspiracy, in return for large campaign contributions, hundreds of unnamed public officials "bestowed illegal favors" on Enron and its accountants and lawyers by, among other things, voting for legislation such as the Federal Securities Litigation Reform Act of 1995. *Id.* ¶ 96.

On February 18, 2002, this Court signed an Order of Consolidation in the *Wilt* case, which provided that "[p]ursuant to the order of consolidation entered on December 12, 2001, this case is hereby CONSOLIDATED in the lead case H-01-3624, Newby v. Enron Corp. et al." That Order was docketed on February 20, 2002.[3]

The Order of Consolidation dated December 12, 2001, consolidated a number of existing cases related to Enron that "all arise from a common core of operative facts." Dec. 12 Order at 17. The December 12 Order also provided that future cases filed against "any or all" of a list of defendants, not including any of the V&E Defendants, were also to be "automatically" consolidated,

[3] The V&E Defendants object to consolidation pursuant to the provisions of the December 12 Order of Consolidation, which permit such objections within 10 days of the filing of the Notice of Consolidation. Dec. 12 Order at 19.

subject to any party's right to object to consolidation within 10 days.[4] *Id.* at 18. More particularly, the December 12 Order divided the future cases to be consolidated into three categories: federal securities cases were to be consolidated under the *Newby* case, Civil Action No. H-01-3624; shareholder derivative cases were to be consolidated under Civil Action No. H-01-3645, *Pirelli Armstrong Tire Corp. Defined Benefit Plan, et al. v. Lay et al.*; and employee benefit plan cases were to be consolidated under Civil Action No. H-01-3913, *Tittle v. Enron Corp. at al.* This case falls into none of these categories.

II. WILT'S CLAIMS AGAINST THE V&E DEFENDANTS SHOULD BE SEVERED FROM THE REST OF THE *WILT* CASE AND UNCONSOLIDATED FROM *NEWBY V. ENRON.*

The Order of Consolidation entered in this case on February 20 – which was likely entered "automatically" under the December 12 Order – had the effect of dragging the V&E Defendants, who have not been named as defendants in any other Enron-related case now before this Court, into the massive *Newby* federal securities class action. This presumably occurred because Wilt had joined the V&E Defendants with several other groups of

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[4] The full list of defendants included Enron Corp., Andrew S. Fastow, Kenneth L. Lay, Jeffrey K. Skilling, Richard Causey, Mark Frevert, Cliff Baxter, Lou Pai, Robert A. Belfer, Norman P. Blake, Jr., Ronnie C. Chan, John H. Duncan, Wendy L. Gramm, Robert K. Jaedicke, Charles A. Lemaistre, John Mendelsohn, Paulo V. Ferraz Pereira, Frank Savage, John Wakeham, Herbert S. Winokur, Ken L. Harrison, Jerome J. Meyer, John A. Urquhart, Joint Energy Development Investments, L.P., Joint Energy Development Investments II, L.P., Chewco Investments, L.P., a/k/a Chewco Investments of Houston, L.P., Michael Kopper, LJM2 Co-Investment, L.P., Arthur Andersen LLP, Mary K. Joyce, Rebecca Mark-Jusbache, Ken Rice, Steven Kean, Stanley Horton, Richard Buy, Ben Glisan, Kristina Mordaunt and Northern Trust Company.

defendants who are expressly identified in the Consolidation Order.[5] It is, however, outside the scope of the Consolidation Order, wrong and impractical to lump Wilt's modest claims against these attorneys – claims that differ significantly from those in the *Newby* action and that raise difficult issues of attorney-client privilege – with *Newby*. For the reasons set forth in more detail below, Wilt's claims against the V&E Defendants should stand – or, more likely, fall – on their own.

A. The Claims Against the V&E Defendants Should Be Severed From the *Wilt* Case.

Severing the claims against the V&E Defendants from the rest of the *Wilt* case is necessary for two reasons. First, although the *Wilt* case does not fall within the December 12 Order of Consolidation, other defendants named in *Wilt* have not objected to consolidation. Consequently, severance is necessary to separate the claims against the V&E Defendants – and those claims alone – from the *Newby* consolidated action. Second, joining the claims against the V&E Defendants with claims involving other parties – even if only the other claims in the *Wilt* case – is impractical and prejudicial.

Rule 21 provides that "[a]ny claim against a party may be severed and proceeded with separately." "Questions of severance are addressed to the broad discretion of the district court." 7 Charles Alan Wright, Arthur R. Miller

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[5] Unlike the V&E Defendants, many of the other named defendants in the *Wilt* case, including first-named defendant Andrew Fastow, are on the list in the December 12 Order.

& Mary Kay Kane, FEDERAL PRACTICE & PROCEDURE § 1689 at 515-16 (3d ed. 2001). The Court should exercise its discretion to order severance here.

As described more fully in Section II.B.1 below, the December 12 Order of Consolidation provided for consolidation of suits against specifically enumerated defendants. None of the V&E Defendants appears on the list. Because the same rationale does not apply to other defendants in the *Wilt* complaint, removal of the claims against the V&E Defendants from the consolidated *Newby* action requires that the claims against V&E first be severed from Wilt's claims against others. For that reason alone, the motion to sever should be granted.

In addition, as described more fully in Section II.B.2 below, severing the claims against the V&E Defendants is required to protect the attorney-client privilege. Where courts have been faced with multi-party litigation that could infringe upon the attorney-client privilege, as here, they have not hesitated to order a severance or separate trial to best preserve the sanctity of the privilege. See cases cited at p.11 below. That is the proper result here.

B. Wilt's Claims Against the V&E Defendants Should Not Be Consolidated with *Newby*.

Consolidation of the claims against the V&E Defendants in *Newby* is inconsistent with both the terms and the purposes of the December 12 Order of Consolidation, and would pose intractable problems of attorney-client privilege.

1. Consolidation is Inconsistent with the December 12 Order and Would Be Prejudicial to the V&E Defendants.

Although consolidation in this case apparently occurred "automatically" under the December 12 Order based on the identity of the other defendants, consolidation of Wilt's claims against the V&E Defendants would not advance – indeed it would frustrate the purpose of – the December 12 Order. The December 12 Order does not call for consolidation of Wilt's claims against the V&E Defendants, for three reasons.

First, the December 12 Order provided that only federal securities claims are to be consolidated in *Newby*, but the claims against the V&E Defendants are not federal securities claims. Wilt's claims arise under state law. On their face, Wilt's claims are not properly consolidated in *Newby*.[6] The differences between Wilt's $11,000 state-law claim and the huge federal securities claims are striking. The *Newby* case brings together numerous federal-law class actions that seek to represent thousands of purchasers of Enron stock and that will undoubtedly seek billions of dollars in damages under familiar standards of federal securities law. Wilt's claim, on the other hand, is an individual claim based on an alleged $11,000 loss. The Wilt case is an attempt to apply state law in furtherance of a "creative" theory of massive public corruption that supposedly infects all of official Washington, all in order

[6] Every other case consolidated in *Newby*, both on December 12 and since then, has been a federal-question case based on the federal securities laws.

to remedy a modest individual loss.[7] It would be prejudicial to the V&E Defendants, who believe that Wilt's claims against them are meritless, to consolidate his $11,000 claim with the *Newby* case.

Second, the December 12 Order was intended to apply to cases arising from a "common core of operative facts," and the claim Wilt seeks to litigate is not based on the same facts as the *Newby* consolidated action. Judicial Watch has pointedly sought to distinguish the *Wilt* case from other Enron-related cases; in its press release announcing the filing of this suit, it stated that this case is "[u]nlike many other lawsuits arising from the Enron scandal," and is designed to address "pervasive political, business and legal corruption" that goes "much deeper than the financial fraud" that is the subject of the *Newby* action.[8] Because of this lack of commonality of subject matter, consolidation is not warranted.

Third, none of the V&E Defendants appears on the list of defendants in the December 12 Order. Under the Order's plain terms, only claims against enumerated defendants are to be consolidated. This is logical, because the purpose of the Order of Consolidation (which was sought by the defendants) was to streamline multiple cases brought against the same parties.

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[7] Wilt appears to be attempting to evade the holding of *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994), that there is no claim for aiding and abetting a violation of Section 10(b) of the Securities Exchange Act of 1934. Wilt has filed "creative" state law claims for a relatively modest loss and now is attempting in effect to drag them into litigation where the Supreme Court says they do not belong.

[8] Available at www.judicialwatch.org/1454.html.

The V&E Defendants are not among those parties; they have not been named as defendants in any other case now pending before this Court. The courts have recognized that "[t]he systematic urge to aggregate litigation must not be allowed to trump our dedication to individual justice, and we must take care that each individual plaintiff's – and defendant's – cause not be lost in the shadow of a towering mass litigation." *In re Brooklyn Navy Yard Litig.*, 971 F.2d 831, 853 (2d Cir. 1992). To drag the V&E Defendants into the *Newby* consolidated action would not comport with the aims of the December 12 Order and would be unfair to the V&E Defendants.

Moreover, because the V&E Defendants are lawyers who played substantially different roles in the Enron situation than did those listed in the December 12 Order, it makes good sense to continue to observe the distinction drawn by the December 12 Order. When lawyers are being sued by someone other than their client based on work done for a client, they stand in a totally different position – both with respect to their duties and their defenses – than the other defendants. "An attorney's duties that arise from the attorney-client relationship are owed only to the client, not to third persons," and such third persons generally "have no right of action against the attorney for any injuries they suffer because of the attorney's fault in performing duties owed only to the client." *Lewis v. American Exploration Co.*, 4 F. Supp.2d 673, 677-78 (S.D. Tex. 1998) (internal citations omitted).

For all these reasons, the Court should reconsider its Order of Consolidation in this case and should issue an Order providing that Wilt's claims against V&E and its lawyers are no longer consolidated in *Newby*.

2. Consolidation of the V&E Defendants Into *Newby* Would Cause Intractable Problems of Privilege That Would Complicate the Larger Case.

In addition to being inconsistent with the literal terms of the December 12 Order (as set forth above), consolidation would also undermine the purpose of that Order because it would introduce thorny privilege issues into the entire *Newby* case. The December 12 Order aimed to "ensure the orderly progress of these lawsuits." Dec. 12 Order at 17. Consolidation of Wilt's claims against the V&E Defendants, however, would require the Court to adopt awkward mechanisms to deal with privileged information – thus interfering with rather than advancing the "orderly progress" of the *Newby* action.

V&E's defense on the merits in this case – if Wilt's claim survives a motion to dismiss – may well require disclosure of Enron's privileged information. A lawyer may divulge confidential information "[t]o establish a defense to a . . . civil claim . . . against the lawyer or the lawyer's associates based upon conduct involving the client or representation of the client." TEXAS RULES OF PROFESSIONAL CONDUCT R. 1.05(c)(6) (2001). The disclosure of confidential information, however, must be "no greater than the lawyer believes necessary to the purpose." TEXAS RULES OF PROFESSIONAL CONDUCT R. 1.05 cmt.

14 (2001); *see also* MODEL RULES OF PROFESSIONAL CONDUCT R. 1.6 cmt. (2001) (same).

Consistent with this principle, courts have required that litigation involving counsel adopt procedures to prevent unnecessary dissemination of this privileged information. While protective orders and sealing of records can limit disclosure of confidential information in two-party cases, courts faced with multi-party litigation have taken stronger action. For example, it is appropriate to order a severance or separate trial to best preserve the sanctity of the privilege. *See, e.g., Doe v. A Corporation*, 709 F.2d 1043, 1049-50 (5th Cir. 1983) (barring attorney from prosecuting class action litigation against his former employer as either class attorney or class representative, but permitting him to pursue his own claims separately in individual lawsuit); *Cannon v. U.S. Acoustics Corp.*, 532 F.2d 1118, 1120 (7th Cir. 1976) (disqualifying former attorney from being plaintiff in shareholders' suit, but permitting his compensation claim against client and ordering severance of that claim from the larger suit); *United States v. Walters*, 913 F.2d 388, 393 (7th Cir. 1990) (holding severance necessary in multi-party criminal case where one jointly-represented party sought to invoke an advice-of-counsel defense but other did not; "attorney-client privilege ranks high among the precious gems of our adversary system of justice" and "[w]here, as here, the attorney-client privilege is compromised by joint trials, we must rule on the side of severance"); *United States v. Alexander*, 735 F. Supp. 923 (D. Minn. 1990) (where both client and

attorney indicted, case was severed on grounds that the attorney-client privilege would be jeopardized by a joint trial).

Moreover, even if consolidation were theoretically possible here, it would require the imposition of rigorous strictures on the dissemination of privileged information that would complicate and potentially delay the *Newby* case. While Wilt may gain access to privileged information used by V&E to defend itself against his claims, the principle of minimizing the disclosure of privileged information dictates that the many other parties to the massive consolidated *Newby* action not gain such access. Awkward mechanisms would be necessary to maintain these barriers within the context of a consolidated action, if it could be done at all.

Given the extremely large number of parties involved here, to achieve judicial economy and the orderly pursuit of justice, the Court should vacate the Order of Consolidation with respect to the claims against the V&E Defendants (and to sever those claims from the other claims in the *Wilt* case). This avoids the necessity of a broad, cumbersome protective order applicable to scores, if not hundreds, of persons; avoids the consumption of considerable party resources necessary to police such expansive protective measures; and avoids satellite litigation over these issues.

CONCLUSION

For all the reasons stated above, the Court should grant the motion to sever and should order that Wilt's Claims against the V&E Defendants are no longer consolidated in the *Newby* action.

Respectfully submitted,

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Dated: March 4, 2002

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Ralph A. Wilt, Jr.,	§	
	§	
Plaintiff	§	Civil Action No. H-02-0576
	§	Consolidated Lead H-01-3624
vs.	§	
	§	
Andrew S. Fastow, *et al.*	§	
	§	
Defendants.	§	

ORDER

Upon consideration of the Motion To Oppose Consolidation And To Sever The Claims Against Them filed by Defendants Vinson & Elkins, L.L.P, Ronald T. Astin, Joseph Dilg, Michael P. Finch, and Max Hendrick III (collectively "V&E Defendants"), the supporting memoranda, and any response(s) thereto, and the applicable law and facts, it is hereby:

ORDERED that the V&E Defendants' objection to consolidation is SUSTAINED and the Order of this Court entered on February 20, 2002 directing consolidation of *Wilt v. Fastow, et. al.*, Civil Action No. H-02-0576 with *Newby v. Enron Corp. et al.*, Consolidated Lead Case No. H-01-3624 is hereby VACATED as to the claims asserted against the V&E Defendants; and

FURTHER ORDERED that the V&E Defendants' request for severance is hereby GRANTED;

FURTHER ORDERED that all claims asserted against the V&E Defendants by Plaintiff Wilt in Civil Action No. H-02-0576 are hereby severed

from that action and that the Plaintiff Wilt is directed to file an amended complaint in Civil Action No. H-02-0576 which does not contain any claims against the V&E Defendants; and,

FURTHER ORDERED that the Plaintiff Wilt is directed to file a separate complaint naming only the V&E Defendants which shall be assigned a new and separate civil action number by the Clerk of this Court..

Date: _____

_____
Hon. Melinda Harmon
United States District Judge